

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1568

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 76-1568

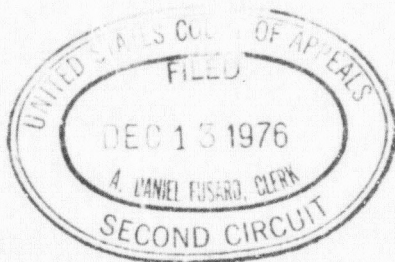
UNITED STATES OF AMERICA,
Appellee,

- v -

JOHN E. ASHER,
Defendant-Appellant.

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BRIEF FOR THE UNITED STATES OF AMERICA



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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John E. Asher appeals from an order entered November 18, 1976, by the Honorable Robert L. Carter, United States District Judge, denying his motion to vacate a portion of his sentence, imposed on July 20, 1976.

On June 3, 1976, Asher pleaded guilty to a two count information charging him in Count One with submitting false claims upon the United States, in violation of Title 18, United States Code, Section 287, and in Count Two with making false statements in a matter within the jurisdiction of a department or

agency of the United States, in violation of Title 18, United States Code, Section 1001. On July 20, 1976, Asher was sentenced by Judge Carter to two consecutive sentences of two years' imprisonment, with all but six months of each suspended. On September 23, 1976, Asher moved to vacate the sentence on Count Two. The Government's memorandum in opposition was filed on October 14, 1976, and Asher's reply was filed on October 20, 1976. On November 18, 1976, Judge Carter denied Asher's motion without opinion. Eleven days later, Asher filed his notice of appeal from that order.

Statement of Facts

John Errol Asher, a medical doctor specializing in internal medicine, was charged on March 11, 1976, in Indictment 76 Cr. 242 in sixty-six counts: thirty-two counts of false medicaid-generated claims against the Government, in violation of Title 18, United States Code, Sections 287 and 2; thirty-two counts of making false statements in a matter within the jurisdiction of a department or agency of the United States, also arising from medicaid claims, in violation of Title 18, United States Code, Sections 1001 and 2; one count of income tax evasion, in violation of Title 26, United States Code, Section 7201; and one count of making a false declaration in his tax return in violation of Title 26, United States Code, Section 7206 (1). This indictment, charging false claims and false statements committed during

the year 1971 exclusively, superseded an earlier indictment, 76 Cr. 111, filed in January, 1976, charging essentially the same offenses.

On June 3, 1976, Asher consented to the filing of a two count information, 76 Cr. 518, charging him essentially with submitting false claims and making false statements in connection with his medical practice at certain "medicaid mills." The two counts of the information, when taken together, covered all of Asher's false claims and false statements in the medicaid program for the years 1970 through 1973. Asher, as part of his agreement with the Government, pleaded guilty to both counts of the information. Each of the prior indictments against him has been nolle prossed.

At the time of his plea of guilty, the court advised Asher that he could receive a total on the two counts of up to ten years' imprisonment and \$20,000 in fines for the crimes he was admitting. (June 3, 1976, Tr. 5). Asher's attorney did not, at that time, suggest to the court that this figure was incorrect. Similarly, counsel did not suggest at the time of the imposition of sentence that the now-complained-of cumulated sentence was illegal.* Only after a Rule 35

* Asher does not presently claim that his sentence should be vacated because it was excessive; however, he does suggest that he was given virtually the harshest sentence imposed upon anyone who did plead guilty to crimes arising from this investigation. (Br. 3). He does not report, however, that following Asher's sentence, one chiropractor was sentenced to four years' imprisonment following a trial, and two others received prison terms of five years, following guilty pleas and cooperation with the Government. None of these three was sentenced by Judge Carter.

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motion to reduce his sentence was denied (App. 2), did Asher file the instant motion alleging the illegality of his sentence. Asher is presently serving his sentence, which began upon his surrender on August 20, 1976.

ARGUMENT

THE DISTRICT COURT'S SENTENCE WAS PROPER
AND SHOULD NOT BE DISTURBED.

The District Court acted properly and within its discretion in sentencing Asher to consecutive sentences of six months' imprisonment; Asher's claim that his sentence constitutes an illegal "pyramiding" of penalties has no merit.

Relying principally upon United States v. Slutsky, 487 F.2d 832 (2d Cir.) cert. denied, 416 U.S. 937, (1973), and United States v. White, 417 F.2d 89 (2d Cir. 1969), Asher asserts that the consecutive sentences here imposed were illegal. Asher's analysis of those cases fails to consider their most significant facts: the consecutive sentences there imposed exceeded the maximum permissible sentence under the major count. Indeed, this was the very vice of "pyramiding" beyond the legal maximum for a single count that the Supreme Court singled out in Prince v. United States, 352 U.S. 19 (1957), where the total sentence imposed was 35 years, 10 years in excess of the maximum on the major count.

Thus, in White this court said:

"To cumulate penalties beyond the maximum authorized by §7201, is therefore improper under these circumstances...." 417 F.2d at 94. (emphasis added).

That holding was reaffirmed in Slutsky:

"We therefore hold that the cumulation of penalties beyond the maximum authorized by Section 7201 is improper." 487 F.2d at 845. (emphasis added).

In this case, even assuming arguendo that Section 287 is a lesser included offense within Section 1001,* Asher's penalties, combined, do not exceed the maximum which could have been lawfully composed upon either count to which he pleaded.

Neither Slutsky nor White holds that a sentence imposing cumulative penalties totalling less than the maximum permissible under the major count must be vacated. Indeed, quite the opposite is the case. Thus, in United States v. Cramer, 447 F.2d 210 (2d Cir. 1971), cert. denied, 404 U.S.

* The Government does not concede this. Although from a common derivation, the two sections carry equal penalties (5 years and/or \$10,000 fines, maximum) and were specifically separated and their penalty provisions conformed in the Federal Criminal Code during the 1948 revision. If anything, this division of these sections indicates a clear congressional intent to treat these statutes separately as part of separate regulatory schemes. All of the "merger" cases cited by Asher (Br. 6-8) involve statutes that form parts of a single, cohesive regulatory scheme (e.g., bank robbery, tax evasion) in which the "lesser included" offenses involve lower maximum penalties and/or substantially lower quantum of proof, particularly involving scienter. No such parallel exists in the combination of sections 287 and 1001. Both have equal penalty provisions. Each requires virtually identical scienter proof. They are each physically located in separate sections of Title 18. Finally, the elements required to prove the two offenses are not coterminous.

1024 (1972), this Court upheld a cumulative sentence totaling less than the maximum in circumstances strikingly like those here. There, the defendant Louis Cramer received fines in a tax evasion case on the "lesser included" offense in addition to 5 years' probation and six month's imprisonment on the "greater" offenses. In upholding the cumulative effect of the sentence, and denying Cramer's claim that the sentence was illegal, this Court held:

"Assuming arguendo that the charges of willfully assisting in the preparation of false partnership returns, 26 U.S.C. §7206(2) (Counts 3 and 4), are lesser offenses included within §7201 (Counts 1 and 2), the sentences and fines imposed do not violate the principle of White. Since the Cramers were found guilty of two counts of willful tax evasion, 26 U.S.C. §7201, they could have received maximum prison terms of five years and fines of \$10,000 for each of Counts 1 and 2. When the sentences actually imposed under the companion counts for each year (Counts 1 and 3 relating to 1962, and Counts 2 and 4 relating to 1963) are considered together it becomes clear that there was no cumulation beyond the maximum." 447 F.2d at 220.

These facts were entirely different from those in White and Slutsky, where the fines (as well as the prison terms) exceeded the legal maximum for one count, and virtually mirror the facts of this case.

Judge Carter's intention in this case was clear: Asher was to serve one year in prison, followed by a period

of probation. The Court clearly had the power to impose that sentence separately upon either of the counts to which Asher pleaded guilty. Instead, he imposed consecutive six month sentences. Asher now seeks to reap a windfall, and avoid that second six month's incarceration, simply because of a mere formalism - the manner in which the court articulated its sentence.

Asher's claim is particularly unappealing in the context of this case. Faced with a total of 66 counts charging him with felony offenses each carrying penalties of three to five years in prison, Asher instead chose to plead guilty to an information that combined (indeed, even expanded) all of the false statement and fraud counts contained in the earlier indictment. Long after the plea of guilty, where he was specifically informed that he could be sentenced to consecutive sentences, and indeed after the imposition of the sentence, he now attempts to totally avoid half of the restrained sentence the District Court imposed on him. Having received a sentence totalling 1 year in jail, Asher should not now be permitted to thwart the District Court's judgment and avoid half his sentence by his exploitation of what is at most a technical defect in his judgment of conviction.*

* It should be noted that were Asher's contentions to be adopted by this Court, it would render his plea of guilty to Count Two a total superfluity.

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CONCLUSION

For all the foregoing reasons, Judge Carter's order denying Asher's motion to vacate his sentence on Count Two should be affirmed.

Respectfully submitted,

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